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Supreme Court of the United States

OCTOBER TERM, 1903.

Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk

HENRY MUHLKER,
Original Plaintiff, and Plaintiff in Error,

AGAINST

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants, and Defendants in Error.

No. 9

Error to the Supreme Court of New York.

Memoranda on behalf of Defendants in Error in response to Motion to Advance.

IRA A. PLACE,
Attorney for Defendants in Error,
Room 417, Grand Central Station,
Borough of Manhattan,
New York City, N. Y.

THOMAS EMERY,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

HENRY MUHLKER,
Original Plaintiff
and Plaintiff in Error.

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Original Defendants
and Defendants in Error.

No.

Error to the Supreme Court of New York.

MEMORANDA ON BEHALF OF DEFENDANTS IN ERROR IN RESPONSE TO MOTION TO ADVANCE.

The defendants in error appear in response to this "Motion to Advance," mainly for the purpose of having the Court's consideration of it based upon an approximately accurate presentation of the facts pertinent to it, rather than by way of resistance to the granting of the motion.

The view of the counsel for defendants in error is that the facts required by Rule 26 upon which to found such a motion are so conspicuously absent from this application as to suggest inquiry whether the real purpose of the application is not something other than the avowed one.

Such inquiry is further prompted by the marked departure from fairness in the purported statement of the fundamental facts which the case involves, apart from as well as including those which are involved in the consideration of the motion.

If and so far as the statements of paragraphs one to five of the motion papers tend to establish as grounds for the granting of this motion the liabilities of parties to incur or be subjected to costs and expenses in the trial of other cases during pendency of this case in this Court, they are shorn of all force and effect by the paragraph at the foot of page 6 of the motion papers, showing that by order of the Court and agreements of the parties proceedings therein have been stayed to await the disposition of this case in this Court.

Obviously, paragraph "VI." of the reasons for the application presents nothing pertinent to the considerations which this motion involves, as there is practically nothing in common in this case and the proceeding there referred to.

Plaintiff's "Satement of the Matter Involved" is in such form as to carry the inference that this case is altogether like unto the elevated railroad cases therein referred to.

Those cases had relation to the liability of the railroad companies for building, maintaining and operating their elevated railroads in streets theretofore opened and existing entirely free of and unencumbered by any railroad right or burden whatsoever.

The obvious and radical difference between those cases and these Park Avenue cases constitutes the grounds upon which the State courts have held the latter governed by other and different rules of law.

Plaintiff in error, having interposed this motion without waiting for the printing of the case in the Court, proceeds to state the case in general terms, without reference to the

record, in such wise as to impute to it practically identity of character with the ordinary elevated railroad cases.

Presuming that the Court will not dispose of this motion until the case in this Court has been printed, and that the case when printed will show the original pagings, we beg to very briefly present the case, and for that purpose to refer to the former numbering of the pages of the record.

Chapter 115 of N. Y. Laws of 1807 provided for the making of a map or plan of proposed streets and avenues in the upper or northerly portion of the City of New York and in and by sections 9 to 11 thereof provided for acquirement of title by the City as, from time to time, it might determine to open any or either of such streets or avenues (page 57).

In pursuance of this Act such map or plan of the City was made and filed in April, 1811 (page 108; Defts.' Ex. 1).

By Chapter 263, N. Y. Laws of 1831, The New York and Harlem Railroad Company was incorporated, with authority to build a railroad from Twenty-third Street to the Harlem River, the location thereof not to be final until approved by the Common Council of the City, and not to occupy the ground within any street or avenue as shown upon the map or plan of the City, whether opened or unopened, unless consented to by the City (page 81).

In August, 1831, the railroad was located with its centre line coincident with the centre line of the Fourth Avenue, then unopened, as shown upon the city map (Page 110; Defts.' Ex., 2).

This location thereof was consented to by the city, and that consent and the terms and conditions thereof evidenced by agreement in writing of date January 9, 1832, (page 116).

By their respective deeds of date January 18, 1832, Peter Poillon purported to convey north of the centre line of the old Harlem Road, and Benjamin L. Benson pur-

ported to convey south of that line, to The New York and Harlem Railroad Company the centre 24 feet, with the right to occupy with their embankments or excavations the entire width, 100 feet, of the Fourth Avenue, as laid out on the said city map (pages 83–87, and page 112, Deft's. Ex. 3).

By reason of the existence of the railroad in this avenue the city map was changed by Chapter 274 N. Y. Laws of 1837 by adding twenty feet upon either side of the Fourth Avenue (page 81).

By proceedings instituted in 1850 and consummated in or about 1853, the city assumed to acquire title to the ground within the lines of, and to open Fourth Avenue from 38th Street to the Harlem River, under and subject unto all of the laws, ordinances, agreements and consents relating thereto, and thus subject to the right of The New York and Harlem Railroad Company to maintain and operate its railroad within the bounds thereof (pages 57, 58, 112).

The railroad at this point was substantially at a level with the natural surface of the land, consisted of two tracks, and was thus maintained and operated from in or about 1835 to and until after 1872 (pages 78, 79, 114).

Under authority of Chapter 702 N. Y., Laws of 1872, the railroad was depressed and two additional permanent tracks were laid, the change of grade, and also the relation of the grade of the avenue to the former, and to the newly established grade of the railroad, being indicated by Defendants' Exhibit 5; and, the character of the 1872 structure is indicated by the dotted lines on Defendants' Exhibit 8, (pages 114, 124).

Chapters 339, N. Y. Laws of 1892, and 548, N. Y. Laws of 1894, were put in evidence by plaintiff (page 57), and by defendants (page 81), each without objection by the adverse party.

The change of railroad structure under authority of these

Acts was made by the State Board which the Act of 1892 provided for, and the character of that change thereof and the fact that the exterior lines of the present structure are within the exterior lines of the former structure, are shown by Defendants' Exhibit 8 (opposite page 125), the accuracy whereof is testified to (page 95) and in no wise disputed, and the reception of the map in evidence not objected to.

The ground within these lines was, prior to the change under the Act of 1892, devoted to and used for railroad purposes exclusively, and the public had no access across it either directly in front of plaintiff's premises nor at 115th Street, upon which plaintiff's premises corner; the public highway really consisted of two streets, one on each side of the old structure (pages 77, 88). Now, the avenue and 115th Street are open thoroughfares affording free access across every portion thereof (page 88 and black lines on Defts.' Ex. 8, opposite page 125).

Thus the contrast presented by the elevated railroad cases on the one hand and these Park Avenue cases on the other hand, is that the elevated railroads there in question were built upon, occupied and used for their purposes ground and space theretofore devoted exclusively to general public highway street purposes, with abutters' easements naturally and characteristically incident to such free and open street, and that without shadow of title or right as against such abutting owners; while this railroad is built, maintained and operated upon and over ground which was, prior to and until the changes complained of, and but for the Act of 1892 would still be exclusively devoted to, occupied by and used for railroad purposes.

Plaintiff in and by his complaint invoked adjudication upon the rightfulness of that devotion, occupancy and use, as maintained prior to the changes under the Act of 1892, by alleging the fact and claiming injunction and damage in respect thereof (pages 4–6), and the learned

trial Judge found against plaintiff in respect thereof, to wit:

> "That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendants' railroad and structures had there been no change in the same pursuant to Chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally" (page 26).

The practical effect of this is in no respect nullified or diminished by the hypothesis that this land thus rightfully and lawfully occupied and used exclusively by and for the railroad, was nevertheless, in some barren ideal sense, a part of the street.

For all practical purposes, whatsoever street right, and thereto incident abutter's easement right, now extend upon and over this centre strip of land, theretofore rightfully occupied and used exclusively by and for the railroad, whereby the surface thereof is now devoted to street uses, subject to the right of the overhead railroad, are thus extended thereon and thereover by virtue of the Act of 1892, and the carrying into effect of its provisions.

The finding that the company had the right to thus maintain and operate its road, as it did prior to 1897, can but be deemed based upon the facts which the case presents as the foundation of such right.

This is but saying that this finding of the trial Court, and the legal effect thereof, are to be considered in the light of the history of the avenue and railroad which the case presents, and not as a mere abstract proposition apart from the case in and upon which the finding is made.

Whether the railroad was upon grounds which were in legal effect or in some sense a part of the street, or upon what might more properly be termed the railroad company's grounds between two streets, in either case the Act

of 1892 constituted the regulation of both, for, and whereby was effected the enlargement and improvement of the street for public travel.

The Act dealt with a railroad rightfully so maintained and used as to exclude the street and its uses and incidents from all of the ground upon and over which the overhead railroad structure is now maintained and used, and by the means therein prescribed opened to and extended upon and over the surface thereof the public highway and thereto incident easement rights, all qualified and restricted by the right of maintenance and operation of the railroad as therein directed.

If, and so far as if all, the carrying into effect of the provisions of the Act might have been found to result in the taking by the railroad company of any private property, the Act does not deny or refuse, or purport to deny or refuse, remedy adequate to such exigency, and plaintiff has not questioned and cannot successfully question the adequacy of remedy in respect of such exigency provided by State laws applicable thereto now in force.

If in view of and consequent upon the finding and conclusion of the trial Court that this strip of land was rightfully occupied by and used for the railroad, to the exclusion of all other uses, prior to and until the making of the changes complained of, the Court of Appeals concluded and adjudged that defendants could not and did not become trespassers by yielding obedience to the command of the State in operating their trains upon the elevated structure erected therefor upon and over the same land, and that the damage, if any, thereby occasioned to plaintiff, was governed by the doctrine of *damnum absque injuria*, such determination did not involve or embrace any question as to the invalidity of the Act of 1892 by reason of its failure to provide compensation, but, on the contrary, rendered any such inquiry mere dictum, because the case was judicially disposed of before reaching

that inquiry, and upon grounds which rendered that inquiry extra-judicial.

Illustrative of this is the language of Judge O'Brien in the *Fries* case (169 N. Y., 270) at page 278:

> "On the 15th of February, 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the State had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the State compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the State in the exercise of its supreme authority. The conclusion of the learned trial Judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.
>
> The elevated railroad cases in this Court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this Court has held (Conabeer *vs.* N. Y. C. & H. R. R.R. Co., 156 N. Y., 474)."

The gist of the matter ruled upon by the Court, and the supposed error therein, are succinctly stated in the dissenting opinion of Judge Bartlett in the *Muhlker* case (173 N. Y., 560), as follows:

> "If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the

premises in question, the effect of the Act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable."

Notwithstanding the guise in which plaintiff presents it, the fact is nevertheless obvious that what the necessities of plaintiff's case involve, and what plaintiff invokes, is, that this Court review the determination of the State Court based upon all the laws, ordinances, grants, agreements, consents and users whereon the rights of the parties are founded, and thereupon determine that the damage which the State Court had adjudged is not occasioned or accompanied by anything which the law esteems an injury, is, indeed, occasioned or accompanied by actionable injury, and thereby evolve a subject matter to which the inhibitions of the Federal Constitution may be applied.

Respectfully submitted,

IRA A. PLACE,
Attorney for Defendants-in-Error.

THOMAS EMERY,
Of Counsel for Defendants-in-Error.